

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JONATHAN D. BLACK,	§
	§
Defendant Below-	§ No. 315, 2008
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr. ID 0310017732
Plaintiff Below-	§
Appellee.	§

Submitted: January 14, 2009

Decided: March 27, 2009

Before **BERGER, JACOBS**, and **RIDGELY**, Justices.

**ORDER**

This 27<sup>th</sup> day of March 2009, upon consideration of the appellant's Supreme Court Rule 26(c) brief, his attorney's motion to withdraw, and the State's response thereto, it appears to the Court that:

(1) The defendant-appellant, Jonathan D. Black (Black), was convicted by a Superior Court jury in April 2004 of three counts of unlawful sexual contact in the second degree. The jury acquitted Black of first degree rape. The Superior Court sentenced Black as a habitual offender to fifteen years at Level V incarceration on each conviction. Black did not file a direct appeal. In May 2008, he filed a motion for postconviction relief alleging that his trial counsel was ineffective for failing to file a direct appeal. The

Superior Court granted postconviction relief and thereafter resentenced Black, with the assistance of substitute counsel, to the same forty-five year term of incarceration. This is Black's direct appeal.

(2) Black's counsel on appeal has filed a brief and a motion to withdraw pursuant to Rule 26(c). Black's counsel asserts that, based upon a complete and careful examination of the record, there are no arguably appealable issues. By letter, Black's attorney informed him of the provisions of Rule 26(c) and provided Black with a copy of the motion to withdraw and the accompanying brief. Black also was informed of his right to supplement his attorney's presentation. Black has raised five issues for this Court's consideration. The State has responded to Black's arguments, as well as to the position taken by Black's counsel, and has moved to affirm the Superior Court's judgment.

(3) The standard and scope of review applicable to the consideration of a motion to withdraw and an accompanying brief under Rule 26(c) is twofold: (a) this Court must be satisfied that defense counsel has made a conscientious examination of the record and the law for arguable claims; and (b) this Court must conduct its own review of the record and

determine whether the appeal is so totally devoid of at least arguably appealable issues that it can be decided without an adversary presentation.<sup>1</sup>

(4) In response to his counsel's Rule 26(c) brief, Black has raised five issues for the Court's consideration. First, he contends that the Superior Court improperly questioned the child victim regarding her competency in front of the jury. Second, Black asserts he was denied his constitutional right to effectively confront the child victim at trial. Third, Black contends the evidence was insufficient to support his convictions. Fourth, he argues that the charges against him constituted one continuous criminal act and that his multiple convictions violate double jeopardy principles. Finally, he asserts that the Superior Court committed plain error in sentencing him as a habitual offender. We address these claims in order.

(5) Black first contends that the Superior Court erred by questioning the four-year-old victim in front of the jury in order to determine her competency to testify. Black argues that, under *McGriff v. State*,<sup>2</sup> the competency examination should have occurred outside the presence of the jury. We disagree. While the competency examination occurred outside the jury's presence in the *McGriff* case, *McGriff* does not stand for the

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<sup>1</sup> *Penson v. Ohio*, 488 U.S. 75, 83 (1988); *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 442 (1988); *Anders v. California*, 386 U.S. 738, 744 (1967).

<sup>2</sup> *McGriff v. State*, 672 A.2d 1027, 1028 (Del. 1996).

proposition that the competency examination *must* occur outside the jury's presence. The competency examination simply was not at issue in *McGriff*. Moreover, 10 Del. C. § 4302 provides, among other things, that the trier of fact may consider the child's age and understanding of the obligation of taking an oath in judging the child's credibility.<sup>3</sup> The trier of fact in Black's case was the jury. Thus, Section 4302 anticipates that the examination of the child-witness regarding the child's competency to take an oath may occur in the jury's presence.

(6) Black's second argument is that he was denied his constitutional right to confront the victim at trial. While Black contends that he was denied his right to cross-examine the victim, an argument that simply is unsupported by the record, it appears that Black's underlying point is that the Superior Court erred in admitting a prior out-of-court statement that the victim made to an interviewer at the Child Advocacy Center. We review that claim for abuse of discretion.<sup>4</sup> Section 3513 of Title 11 provides in pertinent part that the out-of-court statement of a child victim may be admitted if the child is present and the child's testimony touches upon the

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<sup>3</sup> 10 Del. C. § 4302 provides, "No child under the age of 10 years may be excluded from giving testimony for the sole reason that such child does not understand the obligation of an oath. Such child's age and degree of understanding of the obligation of an oath may be considered by the trier of fact in judging the child's credibility."

<sup>4</sup> *Dailey v. State*, 956 A.2d 1191, 1194 (Del. 2008).

event and is subject to cross-examination.<sup>5</sup> In Black's case, the record supports the Superior Court's admission of the statement because the child was present, her testimony touched upon the events in question, and she was subject to cross-examination. Accordingly, we find no abuse of the Superior Court's discretion.<sup>6</sup>

(7) Next, Black contends that the Superior Court erred in denying his motion for judgment of acquittal. In reviewing a sufficiency of the evidence claim, the Court must determine, after viewing the evidence in the light most favorable to the prosecution, whether *any* rational trier of fact could have found the defendant guilty beyond a reasonable doubt.<sup>7</sup> In this case, the evidence at trial reflected that the victim reported that Black was laying in bed with her and placed her on top of him. He then touched her buttocks and vagina with his finger and touched her buttocks with his penis. This testimony alone was sufficient to support Black's convictions on three counts of second degree unlawful sexual contact.<sup>8</sup>

(8) Furthermore, we reject Black's contention that his multiple convictions violate double jeopardy because his actions were part of one

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<sup>5</sup> 11 Del. C. § 3513(b)(1) (2007).

<sup>6</sup> *Accord Dailey v. State*, 956 A.2d at 1194.

<sup>7</sup> *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

<sup>8</sup> *See Styler v. State*, 417 A.2d 948, 950 (Del. 1980).

continuous act. This Court previously has held that a defendant who commits multiple sexual assaults on the same victim may be punished for each separate and distinct act, even if those acts are violations of the same statutory provision.<sup>9</sup> Black's actions constituted three separate acts, distinct from one another. Having committed the three acts within a short time frame does not prohibit his conviction on three distinct charges.

(9) Finally, Black argues that the Superior Court erred in sentencing him as a habitual offender because the trial court did not comply with the terms of 11 Del. C. § 4215(a). This argument is without merit. Section 4215(a) specifically states that it does not apply in cases of fourth offenders, like Black, who are eligible to be sentenced to a term of life imprisonment under 11 Del. C. § 4214(a). Black does not challenge his prior felony convictions or his eligibility to be sentenced under Section 4214(a). Accordingly, we find no error in the Superior Court's sentencing of Black as a habitual offender.

(10) This Court has reviewed the record carefully and has concluded that Black's appeal is wholly without merit and devoid of any arguably appealable issue. We also are satisfied that Black's counsel has made a

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<sup>9</sup> *Feddiman v. State*, 558 A.2d 278, 288-89 (Del. 1989).

conscientious effort to examine the record and the law and has properly determined that Black could not raise a meritorious claim in this appeal.

NOW, THEREFORE, IT IS ORDERED that the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED. The motion to withdraw is moot.

BY THE COURT:

/s/ Jack B. Jacobs  
Justice